United States Court of Appeals

for the Second Circuit

APPELLANT'S REPLY BRIEF

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74-2004, 74-2041

B P/S

To be Argued by
HERALD PRICE FAHRINGER

United States Court of Appeals

FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,
Appellee,

v.

BEN J. SLUTSKY and JULIUS SLUTSKY,
d/b/a "The Nevele",
Defendants-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK.

APPELLANTS' REPLY BRIEF

E. STEWART JONES, ESQ.,
28 Second Street,
Troy, New York 12181,
(518) 274-5820,

HERALD PRICE FAHRINGER, ESQ.,
One Niagara Square,
Buffalo, New York 14202,
(716) 856-8400,
Attorneys for Appellants.

BATAVIA TIMES, APPELLATE COURT PRINTERS
A. GERALD KLEPS, REPRESENTATIVE
[illegible] CENTER ST., BATAVIA, N. Y. 14020
716-343-0457

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Preliminary Statement

On September 30, 1974 the government served its answering brief upon counsel. This reply brief challenges several of the arguments urged by the government and is further necessitated by several important developments in the law of sentencing which have occurred subsequent to the filing of our opening brief.

I.

The 4208(a)(2) Issue

The government suggests that this Court should reject appellants' claims that the sentence be invalidated due to the trial judge's obvious misunderstanding about the ineffectiveness of an "(a)(2)" sentence because our remedy lies in a civil proceeding against the parole board and because it is not clear Judge MacMahon intended an early release.

The proposal that the Slutskys battle out their complaint over the abortive "(a)(2)" sentence in a civil proceeding against the parole board is indeed disappointing. Such a suggestion is tantamount to thrusting the appellants into a legal maze of administrative procedures reminiscent of that described by Kafka in *The Trial*. Certainly the most appropriate and expedient remedy is to direct a judicial reevaluation of the sentence imposed in light of these uncontroverted facts relating to the worthlessness of an "(a)(2)" sentence. In that fashion the Court can either shorten the sentence or impose judgment under § 4208(a)(1), directing the exact amount of time to be served.

Although Judge MacMahon said some rather unkind things about Ben and Julius Slutsky at the time he sentenced them, he specifically referred to the advantages of an "(a)(2)" sentence and their eligibility for an early parole.[1]

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[1] Judge MacMahon stated:

> "The defendant may become eligible for parole at such time as the Board of Parole may determine under Title 18, U.S.C., § 4208(a)(2)." (703)

More recently, Judge MacMahon in the case of *United States* v. *Charles Travilski*, Cr-1974-67, in the United States District Court for the Western District of New York, imposed an "(a)(2)" sentence stating, in effect, that the defendant could be released at any time. *See* transcript, Court Records, Cr-1974-67, Clerk's Office, United States District Court for the Western District of New York.

Surely these uncontroverted statements support our conclusion that Judge MacMahon at the very least anticipated that Ben and Julius Slutsky could receive an early release under an "(a)(2)" sentence. Otherwise there would have been no purpose in offering them the benefits of that statute. We now know that his intention will not be realized.

At the outset we must acknowledge a typographical error in our brief fixing the amount of time Ben and Julius Slutsky will have to serve under the new parole guidelines as 20-26 months. That time is misstated and should read 26-36 months.[2] The government does not dispute the uncontrovertible facts found by Judge Newman that these guidelines are applied in about 94% of the cases evaluated for parole. *See Grasso* v. *Norton,* 376 F.Supp. 116 (D. Conn. 1974). These important factors, which could not have been known by Judge MacMahon at the time he imposed the "(a)(2)" sentence should properly require a reevaluation of this judgment.

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[2] Ben and Julius Slutsky each have a salient factor score of 11, the highest possible. We are advised the parole board will classify their crime as "highest" in severity because of the amount of money involved. Using this data, the guidelines yield a term of 26-36 months.

II.

Disparate Sentence

Judicial alarm over disparity in sentencing continues to grow. At his year's annual Second Circuit Judicial Conference Chief Judge Kaufman stressed:

> "Modern sensibilities, however, dictate otherwise. A system in which the length of an offender's sentence is determined by the random factor of assignment to a particular judge does not advance the ends of justice."[3]

At this conference, as the Court knows, a sentencing study was conducted under the auspices of the Federal Judicial Center. This study disclosed that the most severe sentence imposed upon an income tax evasion case by the 48 judges participating in that investigation was three years in prison and a $5,000 fine.[4] The median sentence was one year in prison and a $5,000 fine. This means that under the most severe sentence imposed by the 48 judges participating in this study, a person would be eligible for parole after one year's incarceration. Whereas in our case the defendants will not be released until they have served almost three years.

The government urges that the large tax liability here warrants the disparate sentence imposed upon the Slutskys. Putting to one side the serious questions raised over the existence of this tax liability in our motion for a new trial, the size of the tax evaded should not play that large a part in the length of the sentence imposed. In any event, we have located a case comparable to ours. In *United States* v. *Reiner*, 72-Cr-1088, United States District Court for the Southern District of New York, the defendant plead guilty

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[3] *New York Law Journal*, September 9, 1974, at 4.

[4] *See* Table I, *Second Circuit Sentencing Study*, at 6.

to an indictment charging SEC fraud and income tax evasion exceeding a million dollars. The Honorable Constance Baker Motley imposed a three-year sentence. This case is virtually identical to our own and dramatically demonstrates the injustices inherent in the "random factor of assignment to a particular judge."[5]

As of this date we are unable to locate any case involving income tax evasion where the defendants had no prior records and were not involved in organized crime, where a court imposed a sentence longer than three years. By the time this case is argued, the appellants will have spent over three months in prison. Keeping in mind Judge Frankel's admonition of "When [has] a defendant suffered enough," surely Ben and Julius Slutsky cannot be made to pay more. Certainly under all the circumstances of this case the appellants are entitled to be resentenced, or in the alternative, this Court should modify their sentence to time served.

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[5] Kaufman, *op. cit.*

Also relevant is Judge Marvin E. Frankel's reconsideration of the sentence imposed upon Craig A. Braun for tax evasion and his ultimate suspending of a prison term due to the pardoning of Richard Nixon by President Ford. Judge Frankel's comments are well considered and deserve repeating here. He stressed:

> "The alleged crime embraced by the recent pardon may have included among the lesser items tax evasion to the extent of several hundreds of thousands of dollars. . . . There remains, among others, the question of whether and when a defendant has suffered enough." *New York Law Journal*, September 13, 1974, at 1.

III.

Appellate Review of Sentences

The government stubbornly clings to the notion that appellate review of sentences is foreclosed by several Supreme Court decisions. *See* cases collected in appellee's brief at 13 and 14. As we pointed out in our opening brief, these cases do not absolutely bar appellate review although there is some dicta to that effect.[6] Congress has specifically given appellate courts the power to correct an improper sentence under § 2106 of Title 18 which provides:

> "The Supreme Court or any other court of appellate jurisdiction may affirm, modify, vacate, set aside or reverse any *judgment*, decree, or order of a court lawfully brought before it for review, and may remand the cause and direct the entry of such appropriate judgment, order, or decree or require such further proceedings to be had as may be just under the circumstances." (Emphasis supplied)

As we pointed out in our original brief, the non-review doctrine has been articulated primarily by the courts of appeals. The Supreme Court's responsibility for that doctrine is limited to merely dicta.

The government's suggestion that there is no appeal from a denial of a motion for reduction or modification of sentence is ill-considered. This Court entertained appeals from such motions in *United States* v. *Alexander*, 498 F.2d 934 (2d Cir. 1974); *United States* v. *Driscoll*, 496 F.2d 252 (2d Cir. 1974); *United States* v. *Guzman*, 478 F.2d 759 (2d Cir.

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[6] For instance, in *Dorszynski* v. *United States*, 94 S.Ct. 3042 (1974), the Court stressed:

> "The sole issue in this case is the validity of the sentence imposed by the district court." 92 S.Ct. at 3047

The court went on to determine whether the sentence imposed in that case was permitted under the *Federal Youth Correction Guide*.

1973); and *United States* v. *McCord*, 466 F.2d 17 (2d Cir. 1972). Furthermore, the Court considered appeals from guilty pleas involving the propriety of the sentence in *United States* v. *Schwarz*, F.2d (2d Cir., Doc. No. 74-1455, July 23, 1974), and *United States* v. *Valazquez*, 482 F.2d 139 (2d Cir. 1973).

We fully appreciate that appellate review of sentences will add cases to the overcrowded dockets of our courts of appeals. But that is a burden that will have to be borne if justice is to be done. We find it incomprehensible that a defendant has a direct appeal to this Court from an order fixing excessive bail and yet is unable to secure review of a sentence that confines him to prison for five years where the average sentence imposed under similar circumstances is ten months.

However, the claim that appellate courts will become inundated by appeals once the gates are opened to those defendants who receive insufferable sentences is greatly exaggerated. In all probability, most appeals from convictions would include an additional argument that the sentence was inordinately severe and therefore the number of appeals would not be substantially increased. If the judgment were reversed, the issue of the propriety of the sentence would not be reached. If, on the other hand, the judgment were affirmed, it would only mean the court would have an additional issue to resolve. The government's concern over harsh sentences rendered upon pleas of guilty may well not be subject to review under traditional principles of appellate forfeiture applied to pleas of guilty.

Implicit in Judge Friendly's proposal, cited by the government, urging a specialized appellate review board for unjust sentences is an acknowledgement that some review is in order. We would welcome such an innovative tribunal

but until that becomes a reality this Court must assume that responsibility.

Significantly, the American Bar Association's most recent publication on standards for criminal justice recommends that there be appellate review of sentences.[7] The commentary relating to appellate review of sentences provides in part:

> "It should be emphasized at the outset that the Advisory Committee on Sentencing and Review is very much more convinced of the need for some form of review than it is of the exact particulars of how such review should be accomplished.
>
> * * *
>
> "The law books are full of instances in which appellate courts have reviewed the exercise of discretion by a trial judge. . . . In each of these instances, appellate courts are quite used to according latitude to the man on the scene, as it were. But where his judgment is wrong in principle, they do not hesitate to intervene. No more and no less is needed where the sentence is involved."

Finally, Congressman Celler has answered well the objections raised to sentence review based upon the burden it

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[7] 1.1 Principle of review.

(a) In principle, judicial review should be available for all sentences imposed in cases where provision is made for review of the conviction. This is specifically meant to include

(i) review of a sentence imposed after a guilty plea or the equivalent, if the case is one in which review of the conviction would be available had the case gone to trial;

(ii) review of a sentence imposed by a trial judge, a trial jury, or the two in combination; and

(iii) review of a re-sentence in the same class of cases.

(b) Although review of every such sentence ought to be available, it is recognized that it may be desirable, at least for an initial experimental period, to place a reasonable limit on the length and kind of sentence that should be subject to review. *ABA Standards, Appellate Review of Sentences,* § 1.1 (1974).

would place on appellate courts. Objection on that basis, he has observed, ". . . completely evades the issue of whether an appeals procedure is needed to insure the quality of justice that should characterize our courts." *ABA Standards, Appellate Review* at 413, 415.

Conclusion

For these various reasons, the Court should reverse the judgment of the district court and remand for a new trial or, in the alternative, modify the appellants' sentences or remand for resentencing in light of the legal principles and authorities we have presented in this appeal.

Respectfully submitted,

E. Stewart Jones, Esq.,
28 Second Street,
Troy, New York 12181,
(518) 274-5820,

Herald Price Fahringer, Esq.,
One Niagara Square,
Buffalo, New York 14202,
(716) 856-8400,

Attorneys for Appellants.

Lipsitz, Green, Fahringer,
Roll, Schuller & James,
of Counsel.

10/15

AFFIDAVIT OF SERVICE BY MAIL

State of New York)
County of Genesee) ss.:
City of Batavia)

RE: U. S. A.
v
Ben J. Slutsky et al
Docket Nos. 74-2004 & 74-2041

I, Leslie R. Johnson being duly sworn, say: I am over eighteen years of age and an employee of the Batavia Times Publishing Company, Batavia, New York.

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Lawrence A. Schulz, Esq.

One Niagara Square, Buffalo, New York 14202

Leslie R. Johnson

Sworn to before me this

10 day of October, 1974

Monica Shaw

MONICA SHAW
NOTARY PUBLIC, State of N.Y., Genesee County
My Commission Expires March 30, 19 75